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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 745

RIN 3133-AD79

Share Insurance and Appendix

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final Rule.

SUMMARY: Section 343 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)¹ provides that, on a temporary basis, NCUA shall fully insure the net amount that any member or depositor at an insured credit union maintains in a noninterest-bearing transaction account. Although this insurance coverage is self-implementing, and therefore already in place, this final rule: (1) clarifies

¹ Public Law 111-203 (July 21, 2010).

the definition of the term “noninterest-bearing transaction account;” (2) provides that this new insurance coverage is separate from, and in addition to, other coverage provided in NCUA’s share insurance rules; and (3) imposes certain notice and disclosure requirements.

DATES: The rule is effective [Insert date 30 days from publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Frank Kressman, Senior Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518-6540.

SUPPLEMENTARY INFORMATION:

A. Background

1. The Dodd-Frank Act

Section 343 of the Dodd-Frank Act amended the Federal Credit Union Act (FCU Act) to include full share insurance coverage, beyond the Standard Maximum Share Insurance Amount (SMSIA),² for the net amount held in a noninterest-bearing transaction account by any member or depositor at an insured credit union. The term “noninterest-bearing” should be read as including “nondividend-bearing” to translate the provisions of the Dodd-Frank Act into credit union terminology.³ Insured credit unions are not required to

² The SMSIA is defined as \$250,000. 12 CFR §745.1(e).

³ Federal credit unions cannot offer interest-bearing accounts; they can only pay dividends pursuant to the Federal Credit Union Act. Some state chartered, federally

take any action to receive this additional insurance coverage. The additional coverage mandated by Section 343 of the Dodd-Frank Act is temporary through December 31, 2012.

2. The Proposed Rule

In December 2010, the NCUA Board issued a proposed rule to clarify its interpretation of the Dodd-Frank Act provisions regarding noninterest-bearing transaction accounts. 75 Fed. Reg. 80367 (December 22, 2010). The following summarizes the issues discussed in the proposal.

Amendments to Share Insurance Rules

Section 343 of the Dodd-Frank Act amended the share insurance provisions of the FCU Act (12 U.S.C. 1787(k)(1)) to provide separate insurance coverage for noninterest-bearing transaction accounts. Accordingly, as discussed in detail below, NCUA proposed to revise its share insurance regulations in 12 CFR Part 745 to include this new temporary share insurance account category.

Definition of Noninterest-Bearing Transaction Account

The proposed rule incorporated the definition of noninterest-bearing transaction account in section 343 of the Dodd-Frank Act. Section 343 defines a noninterest-bearing transaction account as “an account or deposit maintained at an insured credit union with respect to which interest is neither accrued nor paid; on which the account holder or

insured credit unions may offer interest-bearing accounts pursuant to their state credit union acts.

depositor is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone or other electronic media transfers, or other similar items for the purpose of making payments or transfers to third parties or others; and on which the insured credit union does not reserve the right to require advance notice of an intended withdrawal.” This definition of noninterest-bearing transaction account encompasses only traditional, noninterest-bearing demand deposit (checking or share draft) accounts that allow for an unlimited number of deposits and withdrawals at any time,⁴ whether held by a business, an individual, or other type of member. It does not include negotiable order of withdrawal (NOW) accounts, money-market accounts (MMA), or Interest on Lawyers Trust Accounts (IOLTA).

Under the proposal, whether an account is considered noninterest-bearing or nondividend bearing is determined by the terms of the account agreement and not by the fact that the dividend rate on an account may be zero percent at a particular point in time. For example, an insured credit union might offer an account with a dividend rate of zero percent except when the balance exceeds a prescribed threshold. Similarly, an account that normally bears dividends might have a dividend rate of zero for a particular period if the board of directors of the insured credit union where the account is

⁴ The NCUA Board does not believe the general provisions of Article III, Section 5(a) of the Federal Credit Union Bylaws, or other similar provisions, affect the definition of noninterest-bearing transaction account or the share insurance coverage of this kind of account. Article III, Section 5(a) of the bylaws states that with respect to member withdrawals from share accounts, the federal credit union’s board of directors has the right, at any time, to require members to give up to 60 days written notice of intention to withdraw the whole or any part of the amounts paid in by members. The NCUA Board considers this a broad, administrative provision that does not alter the nature of an account that otherwise satisfies the definition of a noninterest-bearing transaction account.

maintained determines not to, or is prohibited from, declaring a dividend for that period. Such an account would not qualify as a noninterest-bearing transaction account even when the balance is less than the prescribed threshold or no dividend is declared and the dividend rate is zero percent for a particular period. Under the proposed rule, such an account would be treated as an interest-bearing or dividend-bearing account at all times because the account agreement provides for the payment of dividends under certain circumstances. However, under the proposal, the waiving of fees on an account would not be treated as the earning of dividends. For example, an insured credit union can sometimes waive fees or provide fee-reducing credits for members with share draft accounts. Under the proposed rule, such account features would not prevent an account from qualifying as a noninterest-bearing transaction account, as long as the account otherwise satisfies the definition of a noninterest-bearing transaction account.

The proposed rule's definition of noninterest-bearing transaction account would include official checks issued by insured credit unions, such as negotiable cashier's or certified checks. Ownership of such instruments and the right to full insurance coverage are determined pursuant to §745.11 of NCUA's share insurance rules regarding accounts evidenced by negotiable instruments.

Under the proposal, funds swept (or transferred) from a share account to either another type of share account or a non-deposit account are treated as being in the account to which the funds were transferred prior to the time of failure. For example, if pursuant to an agreement between an insured credit union and its member, funds are swept daily

from a noninterest-bearing transaction account to an account or product that is not a noninterest-bearing transaction account, then the funds in the resulting account or product would not be eligible for full insurance coverage as a noninterest-bearing transaction account. However, the proposed rule includes an exception from this treatment of swept funds in situations where funds are swept from a noninterest-bearing transaction account to a noninterest-bearing savings account, such as an MMA. Often referred to as "reserve sweeps," these products could entail an arrangement in which a single account is divided into two sub-accounts, a transaction account and an MMA. The amount and frequency of sweeps are often determined by an algorithm designed to minimize required reserves. In some situations, members may be unaware that this sweep mechanism is in place. Under the proposed rule, such accounts would be considered noninterest-bearing transaction accounts. Apart from this exception for reserve sweeps, MMAs and noninterest-bearing savings accounts do not qualify as noninterest-bearing transaction accounts.

Insurance Coverage

As noted in the proposal, pursuant to section 343 of the Dodd-Frank Act, all funds held in noninterest-bearing transaction accounts are fully insured, without limit. As specifically provided for in section 343 of the Dodd-Frank Act, this unlimited coverage is separate from, and in addition to, the coverage provided to members with respect to other accounts held at an insured credit union. This means that funds held in noninterest-bearing transaction accounts will not be counted for purposes of determining the amount of share insurance on shares held in other accounts, and in

other rights and capacities, at the same insured credit union. For example, if a member has a \$225,000 share certificate and a no-dividend share draft account with a balance of \$300,000, both held in a single ownership capacity, he or she would be fully insured for \$525,000 (plus dividends accrued on the share certificate), assuming the member has no other single-ownership funds at the same credit union. First, coverage of \$225,000 (plus accrued dividends) would be provided for the share certificate as a single ownership account (12 CFR §745.3) up to the SMSIA of \$250,000. Second, full coverage of the \$300,000 share draft account would be provided separately, despite the share draft account also being held as a single ownership account, because the account qualifies for unlimited separate coverage as a noninterest-bearing transaction account.

Disclosure and Notice Requirements

In the proposal, NCUA imposed notice and disclosure requirements to ensure that credit union members are aware of and understand what types of accounts will be covered by the temporary share insurance coverage for noninterest-bearing transaction accounts. The proposal included two such notice requirements. The first requires insured credit unions to post a prescribed notice in their main offices, each branch and, if applicable, on their Web sites.

The second notice requires insured credit unions to notify members individually of any action they take to affect the share insurance coverage of funds held in noninterest-bearing transaction accounts. Although this second notice requirement continues to be

mandatory in the final rule, it is noteworthy that NCUA does not impose specific requirements regarding the form of the notice. Rather, NCUA expects insured credit unions to act in a commercially reasonable manner and to comply with applicable state and federal laws and regulations in informing members of changes to their account agreements.

B. Summary of Comments

NCUA received seven comments to the proposed rule issued in December 2010. Many of the commenters acknowledged that the proposal necessarily adhered to the standards mandated in the Dodd-Frank Act regarding noninterest-bearing transaction accounts. Four commenters specifically noted their support for the rule. The other commenters did not oppose the proposal, but they expressed some concern or made some suggestion for improving the proposal.

One commenter suggested NCUA should update its website regarding the share insurance coverage for noninterest-bearing transaction accounts. NCUA agrees this would be helpful in ensuring credit unions are fully aware of the additional share insurance coverage and the conditions under which it is available. NCUA will update its website in this regard.

Some commenters expressed concern over how the proposal would affect the share insurance deposit, equaling 1% of insured shares, which each insured credit union is

required to maintain with the NCUA (“NCUA Share Insurance Capitalization Deposit”). They requested NCUA discuss this in the final rule. The NCUA Share Insurance Capitalization Deposit is based on a credit union’s insured shares. NCUA’s 5300 Call Report considers shares in noninterest-bearing transaction accounts part of a credit union’s total insured shares. Accordingly, a credit union’s NCUA Share Insurance Capitalization Deposit will be based, in part, on the amount of insured shares its members have in noninterest-bearing transaction accounts.

Other commenters requested NCUA shorten the prescribed notice required by the proposal. They stated a shorter, more succinct notice would be more effective and less confusing. NCUA believes this is a good recommendation and adopts a shorter version of the prescribed notice in this final rule. All other aspects of the proposed rule are adopted as proposed.

C. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small credit unions (those under \$10 million in assets). The amendments enhance share insurance coverage for members with no significant direct cost to small credit unions. Accordingly, the NCUA has determined and certifies that this rule will not have a significant economic impact on a substantial number of small credit unions within the

meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612.

Paperwork Reduction Act

In accordance with section 3512 of the Paperwork Reduction Act of 1995 ("PRA"), 44 U.S.C. 3501 *et seq.*, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget ("OMB") control number. This final rule contains disclosure requirements, some of which implicate PRA as more fully explained below.

The new disclosure requirements are contained in sections 745.14(c)(1) and 745.14(c)(2). More specifically, section 745.14(c)(1) requires that each insured credit union that offers noninterest-bearing transaction accounts post a "Notice of Changes In Temporary NCUA Insurance Coverage For Transaction Accounts" in the lobby of its main office and domestic branches and, if it offers internet deposit services, on its Web site. Section 745.14(c)(2) requires that insured credit unions notify members of any action that affects the share insurance coverage of their funds held in noninterest-bearing transaction accounts.

The disclosure requirement in section 745.14(c)(1) would normally be subject to PRA. However, because NCUA has provided the specific text for the notice and allows for no variance in the language, the disclosure is excluded from coverage under PRA because "the public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included" within the definition

of "collection of information." 5 CFR 1320.3(c)(2). Therefore, NCUA is not submitting the section 745.14(c)(1) disclosure to OMB for review.

The disclosure requirement in section 745.14(c)(2) regarding sweep accounts and any action that affects the share insurance coverage of funds held in noninterest-bearing transaction accounts is mandatory for all insured credit unions, although insured credit unions would retain flexibility regarding the form of the notice. Therefore, in conjunction with publication of this rule, NCUA has submitted to OMB a request to review the estimated burden associated with this disclosure requirement, and that approval is pending.

The estimated burden for the proposed new disclosure under section 745.14(c)(2) is as follows:

Title: "Disclosure of Share Account Status."

Affected Public: Insured credit unions.

Estimated Number of Respondents: 150.

Frequency of Response: On occasion (average of once per year per credit union).

Average Time per Response: 8 hours.

Estimated Annual Burden: 1,200 hours.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, Pub. L. 104-121, provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedures Act. 5 U.S.C. 551. The Office of Information and Regulatory Affairs, an office within OMB, has reviewed this rule and determined that, for purposes of SBREFA, this is not a major rule.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This rule would not have substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999--Assessment of Federal Regulations and Policies on Families

NCUA has determined that this rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

List of Subjects

12 CFR Part 745

Credit unions, Share insurance.

By the National Credit Union Administration Board on May 19, 2011.

Mary F. Rupp

Secretary of the Board

For the reasons discussed above, NCUA amends 12 CFR Part 745 as follows:

PART 745 — SHARE INSURANCE AND APPENDIX

1. The authority citation for Part 745 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1757, 1765, 1766, 1781, 1782, 1787, 1789.

2. Amend section 745.1 by adding a new paragraph (f) to read as follows:

§ 745.1 Definitions.

* * * * *

(f) The term *noninterest-bearing transaction account* means an account or deposit maintained at an insured credit union--

(1) with respect to which either interest or dividends are neither accrued nor paid;

(2) on which the account holder or depositor is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone or other electronic media transfers, or other similar items for the purpose of making payments or transfers to third parties or others; and

(3) on which the insured credit union does not reserve the right to require advance notice of an intended withdrawal.

3. Add §745.14 to read as follows:

§745.14 Noninterest-bearing transaction accounts.

(a) *Separate insurance coverage.* Through December 31, 2012, a member's funds in a "noninterest-bearing transaction account" (as defined in §745.1(f) of this part) are fully insured, irrespective of the SMSIA. Such insurance coverage shall be separate from the coverage provided for other accounts maintained at the same insured credit union.

(b) *Certain swept funds.* NCUA will treat funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings deposit account as being in a noninterest-bearing transaction account.

(c) *Disclosure and notice requirements.* (1) Each insured credit union that offers noninterest-bearing transaction accounts must post prominently the following notice in the lobby of its main office, in each branch and, if it offers internet deposit services, on its Web site:

NOTICE OF CHANGES IN TEMPORARY NCUA INSURANCE COVERAGE FOR TRANSACTION ACCOUNTS

All funds in a "noninterest-bearing transaction account" are insured in full by the National Credit Union Administration through December 31, 2012. This temporary unlimited coverage is in addition to, and separate from, the coverage of at least \$250,000 available to members under the NCUA's general share insurance rules.

The term "noninterest-bearing transaction account" includes a traditional share draft account (or demand deposit account) on which the insured credit union pays no interest or dividend. It does *not* include any transaction account that may earn interest or dividends, a negotiable order of withdrawal ("NOW") account, money-market deposit account, and Interest on Lawyers Trust Account ("IOLTA"), even if share drafts may be drawn on the account.

For more information about temporary NCUA insurance coverage of transaction accounts, visit www.ncua.gov.

(2) If an insured credit union uses sweep arrangements, modifies the terms of an account, or takes other actions that result in funds no longer being eligible for full coverage under this section, the insured credit union must notify affected members and clearly advise them, in writing, that such actions will affect their share insurance coverage.